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August 30, 1996

William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M St., NW
Washington, D.C. 20554

Re: CC Docket No. 96-149

Dear Mr. Caton:

Attached is the original plus 11 copies of Sprint Corp.'s Reply Comments in the above-captioned proceeding. We have also provided Ms. Janice Myles of the Common Carrier Bureau with this filing on diskette in WordPerfect 5.1 format.

Sincerely,

Norina Moy

Norina Moy
Director, Federal Regulatory
Policy and Coordination

cc: Janice Myles

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	CC Docket No. 96-149

REPLY COMMENTS

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TABLE OF CONTENTS

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REPLY COMMENTS

Sprint Corporation, on behalf of Sprint Communications Company, L.P. and the Sprint local exchange carriers, hereby respectfully submits its reply to comments filed on August 15, 1996 in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

As has been the case in most, if not all, of the Commission's rulemaking proceedings dealing with the implementation of the Telecommunications Act of 1996, the BOCs here again assert that they lack the ability and incentive to discriminate in favor of their long distance or other affiliates, and that even if they were to engage in anti-competitive activities, such prohibited activities would immediately be detected by interexchange competitors or by the FCC. In their comments in this proceeding, the BOCs further state that the FCC has limited jurisdiction over their interLATA services; that the Commission's proposed rules are unnecessary and constitute a form of reregulation which conflicts with Congressional intent; that existing discovery procedures and the 90-day timeframe allotted for resolving complaints under Section 271(d)(6) are adequate and that a shift in the burden of proof from complainant to defendant is unwarranted; and that the separate affiliate which each BOC is required to establish under the 1996 Act will lack market power and should be declared nondominant. In short, the BOCs would have the FCC do almost nothing in terms of adopting specific rules, structural and nondiscrimination safeguards, and enforcement mechanisms to implement Sections 271 and 272 of the 1996 Act. After years of urging the MFJ Court to allow them to provide interLATA telecommunications services and to leave the regulation of such services to the FCC, the BOCs are now urging the Commission to, literally, leave regulation of their telecommunications services.

Contrary to the BOCs' assertions, the 1996 Act is not self-executing and far from being unambiguous. The Act sets out the broad outlines of a new regulatory regime under which the local market will be opened up to competition and interLATA markets will be opened up to BOC entry. Interpretation and implementation of this broad plan are left to federal and state regulators. For reasons of consistency and efficiency, interpretation of national policy issues is best accomplished, to the extent feasible, through a federal rulemaking such as this one.[1] Unlike the MFJ court, the Commission need not leave clarification and administration of the provisions of the 1996 Act entirely to case-by-case adjudication. The ability of the Commission to use general rulemaking procedures to provide further guidance to the states and interested parties and to thereby explicate the policies and interpretations it intends to adopt in its administration of the statute entrusted to its jurisdiction so as to carry out the intent of Congress is at the heart of the regulatory process.[2]

It would seem clear that if Congress' vision of an effectively and viably competitive market for all telecommunications services is to become a reality, Commission rules and regulations are necessary to flesh out the broad mandates of the 1996 Act. Compliance with Sections 271 and 272 of the 1996 Act cannot be left to the unsupervised efforts of the regulated entities which have every incentive to try to protect their current monopoly markets and to favor their affiliates' entry into interLATA markets.

Sprint addresses below comments regarding the scope of the FCC's jurisdiction (interstate and intrastate interLATA serv-

[1] Obviously, not all issues can or should be included in a federal rulemaking. There are numerous issues which are better left to carrier-to-carrier negotiations or to state regulatory review.

[2] *See, e.g., NLRB v. Wyman-Gordon Co.,* 394 U.S. 759, 764-765, 89 S.Ct. 1426, 1429 (1969).

ices); activities subject to Section 272 requirements; the need for effective but balanced structural separation, nondiscrimination, and joint marketing safeguards under Sections 271 and 272; and mechanisms to facilitate the enforcement of Section 271 and 272 safeguards.

II. SCOPE OF THE FCC's JURISDICTION.

Numerous parties note that because the Act's definition of "interLATA services" does not distinguish between interstate and intrastate services, it is reasonable to conclude that the Act grants the FCC jurisdiction over both interstate and intrastate interLATA services and interLATA information services.[3] Parties also agree that, for purposes of applying Sections 271 and 272, interLATA services include international services.[4]

BellSouth and several state commissions[5] take a different view. BellSouth acknowledges (p. 15) that Sections 271 and 272 apply to both interstate and intrastate interLATA services. However, it argues that Section 2(b)(1) "deprives the FCC of jurisdiction over 'charges, classifications, practices, services, facilities, or regulations' for intrastate interLATA services"

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[3] *See, e.g.*, Sprint, p. 9; Pacific, p. 3; USTA, p. 7; CompTel, p. 3; AT&T, p. 8; ITAA, p. 5; MCI, p. 3.

[4] *See, e.g.*, Sprint, p. 11; USTA, p. 9; CompTel, p. 8; AT&T, p. 9; ITAA, p. 7; MCI, p. 6.

[5] *See, e.g.*, California PUC, p. 3; Florida PSC (p. 2, arguing that state commissions have the authority to establish safeguards in addition to those established by the FCC); Missouri PSC, p. 2; NARUC, p. 5; New York Dept. of Public Service, p. 2.

(*id.*). The states echo this argument, and emphasize that they have a long history of regulating such services.

BellSouth and the states are correct in asserting that state commissions were historically responsible for regulating intrastate interLATA services. However, the historical federal/state jurisdictional dichotomy changed with passage of the 1996 Act, which, as noted above, gave the FCC jurisdiction over interLATA services generally. As the Courts have uniformly held, "Section 2(b) cannot be read to negate the Commission's express regulatory authority under other provisions of the Act, and the restrictions imposed by Sections 271 and 272 expressly extend to all interLATA services."[6] Moreover, it is impractical, and perhaps impossible, to adopt different rules for intrastate interLATA services than apply for interstate interLATA services.

Of course, this is not to say that the states will not continue to play a critical role in regulating the BOCs' interLATA services. Far from wresting jurisdictional control from the states, the Commission made clear in its *Interconnection Orders* in CC Docket No. 96-98 its view that the Act mandates a system under which the FCC and state commissions share authority over all interLATA services, both interstate and intrastate, with the FCC and state commissions tasked with different regulatory responsibilities. As regards Sections 271 and 272, for example,

[6] AT&T, pp. 8-9, citing *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) and other cases.

the states have a major role in verifying compliance by the BOCs with the competitive checklist requirements of Section 271(c)(2)(B) and managing the audit process under Section 272(d). As Florida correctly states (p. 3), "ensuring compliance with sections 271 and 272 is the responsibility of both federal and state regulators."

III. ACTIVITIES SUBJECT TO SECTION 272 REQUIREMENTS

A. Applicability of Section 272(h)

Ameritech (p. 64), Bell Atlantic (Exhibit I, p. 2), Bell-South (p. 19), and Pacific (p. 5) state that Section 272(a)(2)(B)(iii) allows them to provide interLATA information services for which they had received a waiver from the MFJ Court on an integrated basis. These BOCs are mistaken. Section 272(a)(2)(B)(iii) involves the provision of previously authorized (by the MFJ Court) interLATA telecommunications services. The next section (§272(a)(2)(C)) deals specifically with interLATA information services other than electronic publishing. The fact that Congress adopted separate subsections in this part of the Act makes clear its intention that information services were to be treated separately from interLATA telecommunications services.[7] As US West correctly notes (p. 16), "a BOC is required to have a separate subsidiary for both previously authorized manufacturing and interLATA information services." Thus, a BOC

[7] *See* Sprint, p. 14; USTA, p. 12; US West, p. 16; ITAA, p. 8; and MCI, p. 9.

has one year from the date of enactment of the Act to begin providing interLATA information services -- including those for which it received a waiver from the MFJ Court -- through its separate affiliate.[8]

Nynex states (p. 39) that whether manufacturing and interLATA information services allowed under the MFJ are subject to section 272 requirements depends on the terms of the MFJ Court's orders. Sprint agrees that to the extent the MFJ Court required that a BOC provide an information service on a structurally separate basis, Section 271(f) requires that the BOC continue to provide such service on a structurally separate basis (and, after February 8, 1997, subject to any additional Section 271 and 272 safeguards adopted in the instant proceeding) (*see* Sprint, p. 13, n. 10). However, even if the Court allowed the BOC to provide the interLATA information service on a nonseparated basis, Section 272(h) requires the BOC to begin providing such service on a separated basis after February 8, 1997.

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[8] **However, Sprint does not disagree with Ameritech (p. 65) that services subject to Section 272(a)(2)(B)(iii) -- interLATA telecommunications services -- are not subject to the one-year transition period allowed under Section 271(f), and that such services may be offered on an integrated basis indefinitely.**

B. Mergers and Joint Ventures

In their comments, Sprint (p. 14), AT&T (p. 15), CompTel (p. 12) and the New York DPS (p. 7) explained that because a BOC has a real incentive to favor its prospective merger or joint venture partner, the regions of the merging/partner BOCs should be considered a single in-region under Sections 271 and 272, and that all Section 272 nonstructural safeguards should apply as well. The BOCs, not surprisingly, take the opposite view. They object to imposition of any safeguards during the pendancy of proposed mergers between BOCs. They do not really deny that they have an incentive to favor their prospective merger/joint venture partner; instead, they argue that existing and general nondiscrimination safeguards (*e.g.*, Sections 202 and 272(c)(1)) are sufficient to protect against such activity (*see, e.g.*, Ameritech, p. 66; Pacific, p. 8; USTA, p. 13).

If the general nondiscrimination safeguards were sufficient to protect against the threat of discriminatory or otherwise anticompetitive conduct, Congress would not have mandated the separate affiliate and other nonstructural safeguards contained in Sections 271 and 272. Indeed, the BOCs' recent actions have shown that Congress' concern here was not misplaced, and that the BOCs have both the incentive and the ability to favor their affiliated operations.[9] From the standpoint of fostering even-

[9] For example, in December 1995, on the eve of 1+ intraLATA long distance competition in portions of its territory, Ameritech included bill inserts to 12

Footnote continues on next page.

handed competition, it is preferable to prevent discrimination from occurring, than to try to correct or reverse it after it has occurred. Therefore, the Commission should apply the Section 271 and 272 safeguards to the combined operations of any BOCs which have a pending merger or joint venture with one another.

C. Information services

Several parties agree that for purposes of implementing Section 272, information services should include all enhanced services provided by the BOCs under their various CEI/Computer III authorizations.[10] These parties explain that "information services" and "enhanced services" describe the same activities and that any difference in verbiage between these terms is "without regulatory significance" (ITAA, p. 13).

The BOCs appear to agree with this, with the exception of protocol processing.[11] Bell Atlantic (Exhibit 1, p. 3) and US West (p. 13) claim that information services do not include protocol processing, since protocol conversions "merely format the 'envelope' to allow the customers' original data to travel freely among the disparate networks" (Bell Atlantic, Exhibit 1, p. 3).

million of its customers urging them to institute a PIC freeze on their accounts, including a freeze on their intraLATA and local accounts with their current carrier (Ameritech).

[10] *See, e.g.*, Sprint (p. 16), Pacific (p. 9), AT&T (p. 12), ITAA (p. 12), MCI (p. 16).

[11] ITAA also notes that the BOCs have "repeatedly noted that the MFJ's definition of information services [the same definition incorporated in the 1996 Act] and the Commission's definition of enhanced services are substantially similar, if not identical" (p. 13, n. 35, footnote omitted).

However, information services, as defined in the Act (§3.20), are not limited to the "transforming or processing of...the content of the communication as generated by the subscriber" (*id.*). According to the Act, information services are "the capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications...." Section 3.20 does not contain any reference to "content," and it is difficult to understand how the "capability" which is described in this Section can be offered unless the 'envelop' is properly formatted.

The BOCs concede that the Commission has jurisdiction over interLATA information services, or at least those services for which the BOC provides the interLATA transport. However, Pacific proposes (p. 11) the novel construction that an information service should not be treated as interLATA "if crossing a LATA boundary is transparent to the consumer and provides no direct benefit." This proposed standard should be rejected. In effect, Pacific is urging, without citing any legal precedent, that LATA boundaries be ignored. Moreover, Pacific's proposed standard is unenforceable -- it would appear that the BOC has no way of determining whether a call is interLATA or not unless it questions each customer about each of his or her calls to an information service.

BellSouth also proposes a novel construction regarding the regulation of its out-of-region interLATA information services.

It argues (pp. 20-21) that because information services are commercial speech entitled to First Amendment protections, and there is no "legitimate government need" for additional Commission regulation of these services, the Commission "is powerless to impose a separate affiliate requirement for out-of-region information services."

BellSouth's strained reasoning should be rejected. Section 272(a)(2)(C) requires that the BOCs establish a separate affiliate for "interLATA information services." This section does not distinguish between in-region and out-of-region information services, does not carve out an exception for out-of-region information services, and, given its separate subsection, is obviously meant to be read separately from the preceding subsection which deals with out-of-region telecommunications (not information) services. The Commission does not have the latitude under the Act to remove the separate affiliate requirement for out-of-region interLATA information services provided by the BOCs.

Moreover, the separate affiliate requirement does not impose any restrictions on the content of material contained in any information service provided by the BOCs. The primary case cited by BellSouth, *US West v. FCC* (855 F.Supp. 1184 (W.D.Wash. 1994)), challenged a section of the Cable Communications Act which prohibited telephone companies and their affiliates from providing video programming to subscribers within their service areas. No such prohibition exists here. The Bell companies are not forbidden from engaging in a speech or press activity or expressing any commercial speech as part of their information services, nor, for that matter, are they even prohibited from providing information services at all. The BOCs are allowed to provide whatever interLATA information service they want to, with no restrictions on content, so long as they do so through a separate affiliate. Thus, the Section 272 restriction at issue here merely sets forth the conditions under which the Bell companies are allowed to provide interLATA information services; it does not in any way infringe upon BellSouth's First Amendment rights.[12]

IV. THE MEANING OF "DISCRIMINATION"

In their comments on Section V of the NPRM, the BOCs express an expansive view of the degree to which they may provide disparate treatment to their affiliates and independent entities, without running afoul of the discrimination safeguards contained in Section 272(c) of the 1996 Act. Of particular concern is their assertion that Section 272(c) does not require identical treatment as between the BOC's own affiliate and an independent entity in the provision of administrative services, non-telecom-

[12] In any event, if BellSouth believes there is a constitutional issue here, it should raise such issue before the Courts and not the Commission. "Administrative agencies are not tasked with the duty to adjudicate the constitutionality of a federal statute" (*Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C. 2d, 143, 155 (1985), citing *Johnson v. Robison, 415 U.S. 361 (1974)*). However, as the Commission stated in its order in that proceeding (*id.*), "it is appropriate for [the Commission] to state [its] opinion on" the constitutionality of the challenged doctrine.

munications facilities or goods, and "corporate governance" services (*see, e.g.*, Nynex, p. 34; Pacific, p. 30; US West, p. 36). These BOCs believe that a Regional Holding Company is entitled to seek "economies of scale and scope" by having the BOC or the RHC holding company provide administrative services for itself and its affiliates.

The BOCs' interpretation here should be rejected. At least during the time that a separate affiliate is required, neither the BOC nor the parent RHC should be allowed to provide administrative or support services to the affiliate. To do otherwise is to obviate the requirement under Section 272(b)(1) that the affiliate "operate independently" from the BOC. One measure of independence is whether the service would willingly be accepted by or offered to an unaffiliated entity. As Nynex itself admits (p. 34), it is highly unlikely that an independent entity would request that a BOC holding company perform administrative and support services (such as tariff filings, employee and job evaluations, or investor relations) for it. If an independent entity would not want the BOC or the RHC parent company to perform these functions for it, then the BOC affiliate, if it is to be operated independently, should also not have the BOC or the RHC parent company perform these functions for it either.

Moreover, the BOCs' claim that they are somehow entitled to enjoy the full benefits of economies of scope and scale of providing both interLATA and intraLATA service is inconsistent with the requirement of providing interLATA service through a separate affiliate. Had Congress believed that economies of scale and scope were more important than the prevention of discrimination, it would have allowed the BOCs to provide interLATA telecommunications and information services on an integrated basis immediately upon passage of the 1996 Act.[13] It did not do this. Instead, it required the BOCs to provide interLATA service through a separate affiliate for three years and, if the Commission so determined, after that. The logic of this approach, and presumably the intent of Congress, is that the BOC would not be allowed to enjoy the full economies of providing integrated local and long distance service so long as it could use such a combined offering to discriminate against competitors which could not themselves provide such a combined offering because the provision of local service remained a BOC monopoly. On the other hand, the separate affiliate of the BOC could provide a combined local-long distance offering, and could obtain any inherent economies of scope in such an offering, if it obtains the local service component from the BOC on a nondiscriminatory basis.[14]

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[13] The fact that Congress mandated a separate affiliate is also clear evidence of its belief that affiliate transaction rules by themselves are not a sufficient safeguard against discrimination.

[14] This is not to say that the RHC corporation as a whole would or should be denied all economies of scale. As discussed in Section V below, certain corporate functions, such as establishing personnel policies and purchasing supplies, may be performed by the parent company on behalf of both the BOC and the separate affiliate.

Several BOCs also assert that Sections 272(c)(1) and (e) allow them to provide an independent entity with a functionally equivalent outcome to what the BOC provides itself or its affiliate, without providing identical services, facilities or information (*see, e.g.,* Pacific, p. 27; US West, P. 33). Sprint agrees that, to the extent the independent entity has interconnection standards or network architectures which differ from those used by the BOCs or the BOC affiliates, or requests special facilities or services, the BOC is not required under Section 272(c) to provide identical physical facilities (*see* Sprint, pp. 36, 40). However, the BOC is obligated to make all reasonable efforts to accommodate the needs of the independent entity and to provide a functionally equivalent outcome. The separate affiliate requirements in Section 272 are clearly intended to place the BOCs in a neutral position *vis-a-vis* the separate affiliate(s) and non-affiliated entities providing the same services or performing the same activities. As AT&T correctly states (p. 31):

> ...if a BOC were required to meet only the technical and other requirements of its affiliate and could fail to offer the same quality of service to nonaffiliated carriers merely because they use different equipment, then the BOC would have carte blanche to gain insuperable advantages by designing interfaces that work optimally only with its affiliates' specifications -- and no others -- stifling innovation and other forms of competition.

The BOC is, of course, entitled to recover the reasonable costs of meeting the requirements of the independent entity.

V. STRUCTURAL SEPARATION REQUIREMENTS OF SECTION 272

A number of commenters contend that Congress did not contemplate any separation requirements in addition to those explicitly listed in Section 272(b). SBC Communications, Inc. ("SBC"), for example, argues that

> If Congress had intended a more detailed set of separation rules for BOC provision of interLATA service - such as that set forth within Section 274 regarding BOC involvement with electronic publishing -- then Congress would have written such requirements into Section 272. The fact that Congress did not include such draconian rules must mean that Congress intended that Section 272 be implemented as it was written

SBC, pp. 3-4; *see also*, Bell Atlantic, p. 4.

Sprint believes this to be an incorrect interpretation of the law. Section 272(b) is not self-executing. Rather, it clearly contemplates the need for further actions by the Commission. Thus, Section 272(b)(2) requires that the Section 272(a) affiliate keep its books "in a manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate."

The Commission has never previously prescribed such rules for these particular affiliates, nor could it have done so inasmuch as these affiliates are the creation of the new law. Moreover, since the BOCs were generally unable to provide interLATA service prior to passage of the new law, there would have been no reason for such a prescription. In the *Accounting Safeguards*

NPRM, the Commission explicitly asks whether the Section 272(a)(2) affiliates should "maintain their books, records, and accounts in accordance with generally accepted accounting principles."[15] The Commission's understanding that Section 272(b) requires it to undertake additional action is apparent as a matter of logic and, as an interpretation of its organic statutes, is well within the Commission's discretion. *See, e.g., Alcoa* v. *Central Lincoln Peoples Utility District,* 467 U.S. 380 (1984).

Some commenters contend that Section 272(b) is complete and requires no further action by the Commission except possibly for implementation of subsection 272(b)(2)'s accounting requirements. They argue, for example, that

> In adopting Section 272, Congress deliberately chose the specific separation requirements that a BOC would be required to comply with. Congress obviously could have chosen to include other requirements, but chose not to. Section 272(b)(1) is not an invitation for the Commission to make that judgment anew, and does not authorize the Commission to pick and choose additional requirements that appear nowhere in the statute.

Bell Atlantic, p. 5. *See also, e.g.,* BellSouth, p. 28; Ameritech, p. 37; SBC, p. 7; and Pacific Telesis, p. 19.

These kinds of arguments essentially advocate the hoary maxim of statutory construction, *expressio unius est exclusio alterius* (*i.e.*, the expression of one thing is the exclusion of the

[15] *Implementation of the Telecommunications Act of 1996; Accounting Safeguards under the Telecommunications Act of 1996,* CC Docket No. 96-150, NPRM, FCC 96-309, released July 18, 1996, ¶68.

other). In the *Competitive Carrier Rulemaking,* 85 FCC 2d 1 (1980)(subsequent history omitted), however, the Commission, quoting the D.C. Circuit's opinion in *National Petroleum Refiners Association* v. *FTC,* 482 F.2d 672, 676 (D.C. Cir. 1973), *cert. den.* 415 U.S. 951 (1974) said

> This maxim is increasingly considered unreliable ... for it stands on the faulty premise that all possible alternatives or supplemental provisions were necessarily considered and rejected by the legislative draftsmen.

The Commission continued

> To the extent that the maxim remains viable as a tool for statutory construction, it must be used with caution (citation omitted). As the commentators have explained, "where an expanded interpretation [of the statute] will accomplish beneficial results [or] serve the purpose for which the statute was enacted, ... the maxim will be disregarded and an expanded meaning [of the statute] given." 2A Sutherland Statutory Construction Sec. 47.25 (Sands, 4th Ed. 1975).

The Commission obviously believes that its tentative reading of Section 272(b) would accomplish beneficial results and serve the purpose for which the statute was enacted. For that reason, the statute should not be read as limiting the Commission's ability to do so.

That said, Sprint also notes that there is an obvious and inherent tension between the BOCs' desire to achieve the maximum degree of integration between their monopoly and competitive activities so as to exploit economies of scope or to achieve other goals, on the one hand, and, on the other hand, the opportunity for mischief and the extreme regulatory difficulties that such integration presents. *Compare* ¶6 and n. 13 of the NPRM (denoting the advantages of BOC integration of local, intraLATA and inter-LATA telecommunications services) *with* ¶¶7 and 8 (noting that a BOC may have incentives to improperly allocate regulated costs to competitive ventures and to discriminate against its affiliate's rivals).

In light of the discretion that Congress delegated to the Commission, it is the Commission's job to balance these competing concerns. It is unlikely, as U S West fears, that Congress intended the "operate independently" language to be read in a manner that would, for example, prevent a BOC's officers and directors from fulfilling their fiduciary obligations to the BOC's shareholders to manage a subsidiary the BOC created to meet the new law's requirements, to prevent the BOC and the subsidiary from filing a common tax return, or to preclude the BOC from financing its subsidiary (U S West, p. 23).

But it is equally unlikely that Congress intended that there be so much integration between a BOC's monopoly and competitive activities that effective and timely regulation was for all practical purposes impossible. Although useful and helpful, there are limits to the efficacy of price caps and cost allocation rules as tools to curb misallocation of costs and discrimination. These limits are the reason that the BOCs were denied entry into the interLATA market in the AT&T Consent Decree, and, at least initially, in the 1996 Act itself.

Several commenters argue that the Commission's existing cost allocation rules established in CC Docket No. 86-111[16] are more than sufficient to deter, prevent, and enforce the Commission's rules against misallocation of joint and common costs between regulated and competitive activities and that no additional separations are necessary. As an example of the effectiveness of these rules, they point to the Commission's audits of affiliate transactions in all BOCs (*see, e.g.*, SBC, pp. 13-16).

In the audit of Nynex's Material Enterprises Company (MECO), which covered the years 1984-1988, it was not until 1990 that the issues which were raised by that audit were resolved, and then only pursuant to a consent decree between the Commission and the Nynex telephone companies. *See New York Telephone Company, et al.*, 5 FCC Rcd 5892 (1990) (subsequent history omitted). It therefore took the Commission at least two and as many as six years to resolve conduct that first occurred in 1984 with respect to Nynex's cost allocation practices. Had the proceeding not been resolved through a consent decree, it doubtless would have gone on even longer.[17]

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[16] *Joint Cost Order*, 2 FCC Rcd 1298, *recon.* 3 FCC Rcd 6701, *aff'd sub nom. Southwestern Bell v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990).

[17] As SBC similarly recognizes, the results of the Joint Audit of Southwestern Bell Telephone Company's operating expenses for a four year period "remain under discussion." SBC, p. 16.

The separation requirements of Section 272 will (unless extended by the Commission) sunset within three years after the date a BOC enters the interLATA market (in the case of manufacturing and long distance) or four years after the date of enactment of the Telecommunications Act of 1996 (in the case of interLATA information services). Given the leisurely pace at which audits are resolved, it is entirely possible that the separation requirements will disappear before the completion of an audit to determine whether a BOC has misallocated costs.

Sprint does not believe that Congress intended the Commission's cost allocation rules and subsequent lengthy audits to be a substitute for prophylactic separation requirements at the front end: by the time the Commission is able to audit and resolve issues arising from an audit, any damage to competition is likely to have occurred long ago with no way to compensate.[18]

Similarly, price caps are not a panacea against anticompetitive cross-subsidization and discrimination. Cross-subsidization remains a problem because, as Dr. John E. Kwoka, Jr., one of the architects of the Commission's price cap regime, has explained in testimony before the Department of Justice in the MFJ proceeding, the Commission's plan does not decouple price from actual performance results. Rather, the Commission requires some

[18] Compare the 90 day statutory requirement for the Commission to act on complaints alleging that a BOC has failed to meet the preconditions for entering the interLATA market in Section 271(d)(6)(B).

"feedback" in its price caps regime both to ensure that consumers are able to benefit from the incentives created by price caps for the BOCs to reduce costs and improve productivity, and to adjust the caps in light of actual cost experience of the BOCs. Such feedback compromises the efficiency incentives created by price caps.[19] Thus, although "price caps ... represent improvements on traditional rate-of-return regulation ... [t]he actual plan in place for the BOCs differs in significant and relevant ways from a pure price cap plan that would truly eliminate incentives for cross-subsidization." *Id.* at ¶6.

Dr. Kowka also emphasizes that "price caps do nothing to address the competitive concerns regarding discrimination," since a BOC "retains control of a bottleneck service that must continue to be purchased by its rivals in a different but related market" and is "quite capable of undermining those rivals through discriminatory practices." *Id.* at ¶49. Because of the BOCs' continued ability and incentive to engage in such practices, "[p]rice caps in actual practice -- as opposed to in some ideal form -- do not render unnecessary other restrictions on a regulated firm's behavior." *Id.* at ¶51.

Moreover, the BOCs' interpretation of what constitutes structural separation under Section 272(b) cannot be taken seri-

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[19] *U.S. v. Western Electric et al.*, C.A. No. 82-0192 (HHG), Affidavit of John E. Kowka, Jr. attached to Sprint's Opposition to Motion to Vacate filed November 16, 1994 before the Department of Justice ("Kowka Affidavit") at ¶¶31-48.